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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re: AUTOMOTIVE PARTS ANTITRUST LITIGATION	Master File No. 12-md-02311 Honorable Marianne O. Battani
In Re: ALL AUTO PARTS CASES	
THIS RELATES TO: All Dealership Actions All End Payor Actions	

REPLY IN SUPPORT OF DEFENDANTS' OBJECTION TO, AND MOTION TO REVERSE IN PART AND MODIFY, THE SPECIAL MASTER'S ORDER GRANTING IN PART AND DENYING IN PART AUTO DEALER PLAINTIFFS' MOTION FOR PROTECTIVE ORDER CONCERNING RULE 30(B)(6) DEPOSITIONS OF AUTO DEALER PLAINTIFFS

STATEMENT OF CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Fed. R. Civ. P. 30(b)(6)

Dongguk Univ. v. Yale Univ., 270 F.R.D. 70 (D. Conn. 2010)

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Rule 30(b)(6) depositions are highly favored because courts "are not aware of any less onerous means of assuring that the position of a corporation, that is involved in the litigation, can be fully and fairly explored." *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 639 (D. Minn. 2000). To foreclose Defendants from seeking testimony on Topics 7, 8, 11(c), and 11(g), the burden was on the moving party—the Auto Dealers—to make a specific and particularized showing as to why preparation of, and testimony by, their representatives would be unduly burdensome. Auto Dealers failed to do that in the briefing before the Special Master and in their Opposition before the Court. The Special Master abused his discretion by granting their motion for a protective order on a record devoid of that showing, and the Court should reverse the portion of his Order on Topics 7, 8, 11(c), and 11(g) in Defendants' 30(b)(6) Notice served on Auto Dealers.

I. TOPIC 11(c) IS RELEVANT AND NOT UNDULY BURDENSOME

Topic 11(c) seeks information about Auto Dealers' "revenue, profit margins, and profit on new vehicles sold or leased." As Defendants explained and their experts have affirmed, this information is relevant. Defendants' Objection at 9–10 (12-md-02311, ECF. No. 1175). In their Opposition, Auto Dealers improperly suggest (Opp. at 5–6) that the burden is on Defendants to demonstrate why they need this clearly relevant information when, in fact, the burden is on Auto Dealers to show that this information is not relevant or that preparing a witness would be unduly burdensome. And with nothing else to turn to, they object that Professor Snyder's use of the word "may" is "non-committal." Opp. at 5. That is nonsense. Vehicle revenue and profit information is relevant to whether pass-on occurred and whether rates of pass-on varied over time, and it is also a key indicator of the degree of competition in each Auto Dealer's local market. Defendants'

experts have confirmed that information on profits is highly relevant because it "may" provide important evidence of whether, and to what extent, any alleged upstream overcharges that reached an Auto Dealer were absorbed by the dealer rather than passed on to a downstream purchaser.

None of the case law Auto Dealers cite supports their position either. Auto Dealers first cite *Drug Mart Pharm. v. Am. Home Prods.*, 296 F. Supp. 2d 423, 426 (E.D.N.Y. 2003) for the proposition that profits and losses on new vehicle transactions are immaterial to their claims. But *Drug Mart Pharm*. was a direct purchaser case decided under federal law. *See id*. at 429 (holding that "direct purchasers" could recover under federal antitrust law for "the full extent of the overcharge paid by them" and therefore dismissing plaintiffs' indirect claims under federal law for damages based on lost profits from foregone downstream sales). Obviously, that case has no bearing on Auto Dealers' claims (or Defendants' defenses to those claims), which are brought under state law (where pass-on is available as a defense to Auto Dealers' claims), not federal law (where it is not). Auto Dealers also cite *In re Wirebound Boxes Antitrust Litig*., 131 F.R.D. 578 (D. Minn. 1990), a two-sentence opinion in which a court refused to compel production of financial statements. The deposition topics at issue do not concern a request for production or financial statements; rather, they seek testimony regarding profits on particular transactions at issue in this case. Finally, Auto Dealers cite *In re Carbon Dioxide Industry Antitrust Litig*., 155 F.R.D. 209 (M.D. Fla. 1993). This case is totally inapposite and Auto Dealers' parenthetical describing it is entirely inaccurate. Defendants can only speculate that Auto Dealers' reference to that case was a mistake.

Also meritless is Auto Dealers' contention (Opp. at 5) that their production of some data and documents pertaining to thousands of transactions should somehow relieve them from having to testify on Topic 11(c). Defendants plainly are entitled to ask Auto Dealers questions regarding

the meaning and import of the data and documents they have produced. *See Dongguk Univ. v. Yale Univ.* 270 F.R.D. 70, 74 (D. Conn. 2010) (holding 30(b)(6) deposition testimony is appropriate to obtain binding testimony of the corporation on interpretation of documents previously produced).

Moreover, many Auto Dealers have failed to provide any data or information whatsoever for long periods of time during the alleged class period. On average, each Auto Dealer has produced DMS data covering less than half of the alleged sixteen-year class period, and there are several Auto Dealers who have confirmed they are missing OEM Reports for long periods of time. The only way for Defendants to discover relevant information about those time periods is to ask the Auto Dealer in its deposition. Auto Dealers falsely assert that "all parties have accepted that they will perform their analyses on the large amount of data that has been produced, and that even if certain years are missing the data provided is more than enough to create a viable model and to extrapolate regarding the period for which data is missing, if needed." Opp. at 7. That is entirely baseless and untrue. Defendants have never agreed to any such thing, and tellingly Auto Dealers cite nothing in support of the existence of any such agreement.

Nor is there anything unduly burdensome about having Auto Dealers prepare to testify about their profits on new vehicle transactions during the periods for which they have no records. In fact, if an Auto Dealer, after reasonable preparation, cannot testify to its profits during time periods for which it does not have data, it can simply say "I don't know." *See QBE Ins. Corp. v. Jorda Enters., Inc.*, 277 F.R.D. 676, 690 (S.D. Fla. 2012). If it turns out Auto Dealers have no evidence regarding their profits and profit margins during those periods, that fact alone will be highly probative of the viability of their claims.

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II. TOPICS 7, 8, AND 11(g) ARE APPROPRIATE

Auto Dealers' only objection to the relevance of Topics 7, 8, and 11(g) is their unsupported claim that these topics call for speculation. Opp. at 10. These topics seek the Auto Dealers' *knowledge* about their competitors and the marketplaces in which they competed. Any Auto Dealer should be able, with little, if any, preparation, to answer straightforward questions about its competitors. Indeed, with virtually no preparation, the non-party auto dealers that sold vehicles to End-Payor Plaintiffs have easily provided such information without resort to speculation:

[redacted] Auto Dealers should likewise be able to provide their knowledge on the locations of their competitors, their market share, and any differences in their pricing of vehicles.

Significantly, Auto Dealers do not deny that they have relevant information with which to testify on these topics. Instead, they argue (without any evidentiary support) that any information would be "anecdotal" or create "extreme burdens" in preparing a witness for the deposition. Opp. at 10. But "anecdotes" in this context is just another term for the actual "facts"—the facts about the competition each Auto Dealer faced during the class period and facts about changes in competition over time. These "anecdotes" are evidence that bears on the claims being brought by each Auto Dealer on its own behalf, as well as on behalf of their putative class. Moreover, these "anecdotes" are the very type of real-world facts that other courts accessing pass-on of alleged

overcharges in automotive markets have found to be dispositive when deciding whether or not to certify a class. *See In re Class 8 Transmission Indirect Purchaser Antitrust Litig.*, Civ. Co. 11-00009-SLR, 2015 WL 6181748, at *10 & n.14 (D. Del. Oct. 21, 2015). Preventing Defendants from obtaining these types of "anecdotes" would prejudice their ability to defend themselves and constitute reversible error.

III. PREPARING A WITNESS TO TESTIFY REGARDING TOPICS 7, 8, 11(c) AND 11(g) WILL NOT BE UNDULY BURDENSOME AND ANY BURDEN WILL BE PROPORTIONAL TO THE CASE

Auto Dealers devote most of their opposition to arguing—without any supporting declaration or other evidence—that it would be burdensome to prepare a 30(b)(6) witness on Topics 7, 8, 11(c), and 11(g). The Special Master, however, did not identify burden as a basis for his decision. *See* Special Master's Order Granting in Part and Denying in Part Pls.' Mot. for Protective Order (12-md-02311, ECF No. 1169); Ex. 2, E-mails between Steven Chery, Victoria Romanenko, and Special Master Esshaki (Dec. 30, 2015). Nor did Auto Dealers even attempt to provide the particularized showing of burden that the law requires. *See Dongguk Univ.*, 270 F.R.D. at 74 (party opposing discovery "must support its position with a particular and specific demonstration of fact") (internal quotation marks and citation omitted). Auto Dealers claim—without any substantiation—that, *e.g.*, each Auto Dealer would be forced "to search all of its records and interview numerous employees." Opp. at 7. But Rule 30(b)(6) requires them to do no such thing. Corporate designees in 30(b)(6) depositions are required only to "testify about information *known or reasonably available* to the organization." Fed. R. Civ. P. 30(b)(6) (emphasis added). "While a corporation is not relieved from preparing its Rule 30(b)(6) designee to the extent matters are reasonably available, . . . it need not make extreme efforts to obtain all information possibly relevant to the requests." *In re JDS Uniphase Corp. Sec. Litig.*, No.

C-02-1486 CW (EDL), 2007 WL 219857, at *1 (N.D. Cal. Jan. 29, 2007) (internal citation omitted). *See also Kimberly-Clark Worldwide, Inc. v. First Quality Baby Prod., LLC*, No. 09-C-0916, 2011 WL 3880787, at *2 (E.D. Wis. Sept. 1, 2011) (holding that a 30(b)(6) deponent was reasonably prepared despite not contacting "every former employee listed on the distribution list for the projects in question"). "If a corporation genuinely . . . does not have the information, cannot reasonably obtain it from other sources and still lacks sufficient knowledge after reviewing all available information, then its obligations under the Rule cease." *QBE Ins. Corp.*, 277 F.R.D. at 690. Auto Dealers' hyperbole about the burden they would have to undertake to prepare a 30(b)(6) witness to testify regarding Topics 7, 8, 11(c), and 11(g) cannot support the Special Master's ruling because his decision was not premised on burden, because it is unsupported by any particularized showing of burden, and because it misstates what is required to adequately prepare a witness under Rule 30(b)(6).

Auto Dealers' invocation of Rule 26's proportionality standard (Opp. at 2) is also unavailing. In fact, application of that standard counsels heavily in favor of allowing these topics. As revised, Rule 26(b)(1) provides that a party may seek discovery of relevant nonprivileged information that is "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). The "importance of the discovery" sought by Defendants, and the stakes of this litigation, can hardly be overstated. Auto Dealers purport to represent a class of more than 16,000 auto dealers across thirty-plus different class actions brought against more than fifty Defendant families, as well as separate subclasses in each of thirty states, including the District of Columbia,

in which they assert damages claims for each action. *See, e.g.*, Dealership Third Consolidated Class Action Complaint ¶¶ 236–238 (12-cv-00102, ECF No. 218). Their putative class claims derive from millions of new vehicle transactions that occurred over a seventeen-year class period nationwide, *id*. ¶ 2; *see also* National Automobile Dealers Association, NADA Data 2008 at 51, (12-md-02311, ECF No. 1156-15); National Automobile Dealers Association, NADA Data 2014 at 8 (12-md-02311, ECF No. 1156-16), and they seek hundreds of millions of dollars in damages.

Topics 7, 8, 11(c), and 11(g) seek information that is known only to Auto Dealers. Defendants have no other means to discover the actual, real-world facts about the market in which each Auto Dealer competes without asking the Auto Dealers themselves. These topics require a reasonable level of preparation, and Auto Dealers have ample resources for any necessary preparation. The average U.S. Auto Dealer is a $49 million enterprise that made $6.5 million gross profit and $1.1 million net profit in 2014. NADA Data 2014 at 3. Even if that were not the case, each Auto Dealer has already been earmarked to receive a $50,000 service payment in connection with the settlements reached to date for fulfilling its obligations as a named plaintiff seeking to represent a class of other auto dealers. *See* Order Regarding Auto Dealers' Mot. for an Award of Attorneys' Fees, Reimbursement of Litig. Expenses, & Service Awards at 5 (12-cv-00102, ECF No. 401).

CONCLUSION

For all of the reasons stated above and in Defendants' opening memorandum, Defendants respectfully request that the Court reverse the portions of the Special Master's decision granting Auto Dealers' Motion for Protective Order with respect to Topics 7, 8, 11(c), and 11(g) of Defendants' deposition notice.

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2016, I caused the foregoing **REPLY IN SUPPORT OF DEFENDANTS' OBJECTION TO, AND MOTION TO REVERSE IN PART AND MODIFY, THE SPECIAL MASTER'S ORDER GRANTING IN PART AND DENYING IN PART AUTO DEALER PLAINTIFFS' MOTION FOR PROTECTIVE ORDER CONCERNING RULE 30(B)(6) DEPOSITIONS OF AUTO DEALER PLAINTIFFS** , to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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